IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.48 OF 2005

Hanmantu Nagendrasa Bankapure ...Appellant

vs.

Masjid-E-Rehamanmiya (Ahelahadis) & Ors. ...Respondents

Mr.G.S.Godbole for the Appellant
Mr.I.M.Khairadi for Respondent Nos.1 to 7
Mr.V.B.Naik for Respondent Nos.8 to 10.

CORAM: A.S.OKA,J.
DATE : MARCH 24, 2005.

P.C.:

1. Heard Shri Godbole for the Appellant and Shri Khairadi for Respondent Nos.1 to 7 and Shri Naik for Respondent Nos.8 to 10. Following substantial questions of law arise :

i) Whether the learned Judge of the Appellate Court was justified in overlooking that the Respondent No.1 had absolutely no easementary right over the property of the Appellant bearing C.T.S.No.4811/B-2 and in the absence of any such easementary right, the Court had no jurisdiction to pass a Decree of injunction ?

ii) Whether the learned Judge of the Appellate Court failed to note that even if it is presumed that in the sanctioned building plan no windows or doors are provided in the eastern side wall of the property of the Appellant, there is no right vested in the Respondent No.1 Trust, which had been breached so as to seek an injunction for infringement of such right ?

2. Printing is dispensed with. The Respondents waive service. Considering the facts and circumstances of the case,

Appeal is forthwith taken up for final hearing.

3. Respondent Nos.1 to 7 are the original Plaintiffs and the Appellant herein is the original Defendant No.4. It is the case of the Respondent Nos.1 to 7 that property bearing City Survey No.4812 and 4812-A having municipal House No.63, Guruwar Peth, Solapur is Masjid property owned by them and the property bearing City Survey No.4811-B-2 bearing municipal house No.62-A is owned by the Appellant. The Property of the Appellant is situated on the western side of the property of the Respondent Nos.1 to 7. The case of the Respondent Nos.1 to 7 is that the Appellant demolished the old construction standing on their property and commenced new R.C.C. construction. It is alleged that while making construction, the Appellant has encroached upon the open space of the Respondent No.1 situated behind Masjid. It is contended that the Appellant commenced construction of his building as per the sanctioned plan approved by the Respondent No.8-Corporation. However, the work was carried out by the Appellant contrary to the sanctioned plan as though the Appellant was not permitted to do so, the doors and windows were fixed on the ground floor and the windows were fixed on the first floor in the eastern side wall of the property by the Appellant. Therefore, a suit was filed by the Respondent Nos.1 to 8 for direction to the Respondent Nos.8 to 10 to

close the windows and doors fixed by the Appellant and in the alternative to pull down the eastern side wall of both ground and first floor of the suit property of the Appellant.

4. The Trial Court dismissed the suit. The Trial Court held that the Respondent Nos.1 to 7 have failed to prove that the open space on the eastern side of the property of the Appellant was part of their property. However, the Trial Court held that the Appellant failed to prove that there were windows and door in the eastern wall of his old house and therefore he could not have fixed the door and windows in the eastern wall of his property. In an Appeal preferred by the Respondent Nos.1 to 7, decree passed by the Trial Court was set aside and the suit was partly decreed and the Appellant was restrained from fixing the door and windows in his eastern side wall opening to the Mosque contrary to the sanctioned building plan by the Respondent No.8.

5. The Appellate Court held that there was no permission granted to the Appellant to fix the door and windows on the eastern side of the house. However, the Appellate Court confirmed the finding of the Trial Court that the open space which was claimed by the Respondent Nos.1 to 7 was of the ownership of the Appellant. The Appellate Court did not record any finding as regards existence of any other right in favour of the Respondent Nos.1 to 7 in respect of the property of the Appellant.

6. Shri Godbole the learned Counsel for the Appellant submitted that as the Respondent Nos.1 to 7 have failed to establish their case of alleged encroachment and as they have failed to establish that they have any right of easement, the decree could not have been passed by the Appellate Court in their favour. He submitted that an application has been made to the Respondent No.8 for grant of permission to fix doors and windows and the said application is not decided because of the pendency of the suit filed by the Respondent Nos.1 to 7. He submitted that Respondent Nos.1 to 7 have no right at all to claim any relief once they failed to establish their allegation about the encroachment and once it is held by both the Courts below that the passage which was claimed by the Respondent Nos.1 to 7 is part and parcel of the property of the Appellant.

7. Shri Khairadi appearing for the Respondent Nos.1 to 7 has supported the impugned Judgment and Decree. He submitted that if there was no permission to fix the doors and windows the Appellate Court was justified in passing the decree. The learned Counsel for Respondent Nos.8 to 10 submitted that application made by the appellant is kept pending by the Respondent No.8 -corporation due to the pendency of the suit.

8. I have considered the rival submissions. The Appellate Court has recorded the following findings:

"16. In the Judgment of the Ld.Lower Court, it is reflected that the defendant No.4 now submitted revised building construction plan to the Defendant-Respondent Nos.1 to 3 for sanction and Defendant-Corporation is ready for approval of his revised plan and granted permission for keeping of two doors and one window on the ground floor and two windows on the first floor to the eastern side wall of the Defendant No.4. At the outset, on the date of filing of the suit. The Defendant No.4 acted contrary to the sanctioned plan, therefore, I record my finding against Point No.2 in the affirmative.

17. ...It is undisputed fact, there is a open space to the eastern side of the property of the Defendant-Respondent No.4. It is to be seen whether the said open space is the part and parcel of the property of the appellant. P.W.No.1 Abdul Malan A. Gafar Pathan admitted during the course of his cross-examination that there is no documentary evidence to show that the lane towards western side behind the Mosque is owned by the appellant No.1. Therefore, Ld. Lower Court has rightly held that the open space known as 'Lane' in question to the eastern side of the property of Defendant No.4 is not owned by the Plaintiff. Moreover, there is no evidence on record, the Defendant No.4 inserted beams in the property of Plaintiff and demolished carved pictures on the Mosque. Hence, I am not inclined to accept the argument advanced by the Ld.Advocate for the Appellant. Therefore, I held that Plaintiff is not entitled to seek the relief of mandatory injunction.

18. ...The Respondent No.4 has not encroached upon the open space (lane) situated towards eastern side of the property of Defendant-Respondent No.4. It is not the part and parcel of the property of the Plaintiffs. As against this, the Defendant-Respondent No.4 failed to prove there were windows and

> doors in the eastern side wall of his old property and therefore, he fixed the doors and windows in the eastern side wall of his property. Needless to say, on the date of filing the suit, the defendant-Respondent No.4 raised construction on his property contrary to the sanctioned building plan...."

8. When the Respondent Nos.1 to 7 approached the Civil Court with the case made out that the Appellant was trying to encroach upon the open space, and when the Respondent Nos.1 to 7 failed to establish the said case in fact the Appellate Court should have dismissed the suit filed by the Respondent Nos.1 to 7. The Appellate Court was impressed by the fact that the windows and doors were fixed by the Appellant without there being any permission.

9. It is an admitted position that the Appellant has applied for the permission to fix doors and windows in the wall and the Respondent Nos.1 to 7 have raised an objection with the Respondent No.8 to the said application made by the Appellant. The said application is kept pending because of the pendency of the suit. The doors and windows have already been fixed by the Appellant. As the Respondent Nos.1 to 7 have no right in respect of the property of the Appellant, the decree passed by the Appellate Court cannot be sustained. There is no right of easement established by the Respondent Nos.1 to 7. As the application made by the Appellant is pending only because of the pending litigation, the Respondent No.8 will have to decide the same.

10. The Second Appeal is disposed of by passing the following order :

i) The impugned Judgment and Decree dated 4th August 2004 passed by the Appellate court is quashed and set aside.

ii) The suit filed by the Respondent Nos.1 to 7 stands dismissed.

iii) The Respondent No.8 will decide the application made by the Appellant for grant of permission to fix the doors and windows in the structure which the Appellant has constructed. The said application shall be decided by the Respondent No.8 within a period of 12 weeks from today. Objection, if any, is raised by the Respondent Nos.1 to 7 to the said application, and if the said Respondents are entitled to raise the objection, the Respondent No.8 will consider the said objection before passing an order on the application made by the Appellant.

iv) The application made by the Appellant will be decided on its own merit without being influenced

by the Judgment and Decree passed by the Appellate Court as well as the findings recorded by this Court.

v) After the application made by the Appellant is finally decided, it will be open for the Respondent Nos.1 to 7 to adopt appropriate proceedings, if permissible, in accordance with law.

vi) The Second Appeal is allowed in the above terms with no order as to costs.

JUDGE.